SUPREME COURT OF THE UNITED STATES.

No. 17.—October Term, 1920.

John Barton Payne, Secretary of the Interior, et al., Appellants,
vs.
Central Pacific Railway Company.

Appeal from the Court of Appeals of the District of Columbia.

[February 28, 1921.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This is a suit to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from canceling a selection of indemnity lands under a railroad land grant. The trial court dismissed the bill and the Court of Appeals reversed that decree and directed that an injunction issue. 46 App. D. C. 374. An appeal under § 250, par. 6, of the Judicial Code brings the case here.

The allegations of the bill were admitted by a motion to dismiss, upon which the defendants announced their purpose to stand; and the case as thus made is as follows:

By the act of July 25, 1866, c. 242, 14 Stat. 239, a grant of public lands in California and Oregon was made "for the purpose of aiding in the construction" of a line of railroad from a point in Sacramento Valley to Portland "and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores" over such line. The part of the grant in California was made to the California and Oregon Railroad Company, its successors and assigns, and the part in Oregon to another company. The grant was in present terms—"there be, and hereby is, granted"—and was of "every alternate section of public land, not mineral, designated by odd numbers" within designated limits on each side of the line. With this was coupled a provision that "when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, desig-

nated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections." The line of the road was to be definitely located by filing a map with the Secretary of the Interior; and the work of construction was to be completed in sections of twenty miles within a time named, which was extended to July 1, 1880, by an amendment of June 25, 1868, c. 80, 15 Stat. 80. The completion of each section was to be ascertained and reported by commissioners appointed by the President, whereupon patents for the lands coterminous therewith were to be issued. The railroad was to be and remain "a public highway for the use of the government of the United States, free of all toll or other charges" for the transportation of its property or troops. An assent to the act on the part of each grantee was to be filed within one year after its passage.

The California and Oregon Railroad Company duly assented to the act, definitely located its part of the line by filing the required map, and constructed, completed and equipped that part of the railroad within the extended time. The completion was duly reported by the commissioners and was recognized by the President. In addition, that company and its successors have complied with the act in all other respects. The Central Pacific Railway Company, the plaintiff, became the legal successor of that company in 1899 and holds its rights, title and interest under the grant. The part of the road in Oregon also was completed, but that is not of present concern.

In the process of adjusting the grant it has developed that many of the designated sections in the place limits were lost to the grant by reason of other disposals, homestead settlements and preemption claims antedating the definite location of the line of the road, thereby making it necessary to resort to the indemnity limits to satisfy the grant. The present ascertained losses amount to thousands of acres and it is certain that further substantial losses will develop as the adjustment proceeds. As yet it is impossible to determine even approximately the total losses, because a material part of the grant is still unsurveyed; and this makes it uncertain whether all can be made good from the lands available for indemnity.

The lands in question were selected by means of an indemnity list filed in the local land office February 24, 1910, and the selection was in lieu of losses specified in the list which were actual and entitled the plaintiff to indemnity. The lands selected are in the indemnity limits and admittedly non-mineral, and at the time of selection were such as could be selected to supply the losses specified. The list was accompanied by the requisite sustaining proofs and conformed in all respects to the regulations embodying the directions of the Secretary of the Interior upon the subject. The plaintiff paid the fees collectible thereon and the local land officers approved the list and promptly forwarded it and the accompanying proofs to the General Land Office with the usual certificates and endorsements. It remained pending in that office until January 16, 1915, when the Commissioner ordered its cancelation solely on the ground that in the meantime the selected lands had been included in a temporary executive withdrawal for a water-power site under the act of June 25, 1910, c. 421, 36 Stat. 847. The plaintiff appealed to the Secretary of the Interior and he affirmed the Commissioner's action. A reconsideration was sought and denied, and the plaintiff then brought this suit.

It is not questioned that, had the selection been reached for consideration before the withdrawal, it would have been the duty of the Commissioner and the Secretary to approve it and pass the lands to patent; nor that, if the withdrawal be not an obstacle, it still is their duty to do so. But it is insisted that so long as the selection was without the Secretary's actual approval it gave no right as against the Government and that the withdrawal made while it was as yet unapproved became a legal obstacle to its approval. In this there is an obvious misconception of the office and effect of the selection, and the misconception is particularly shown in the brief for the appellants, where the selection is treated as only a preliminary land application or filing. Counsel there say: "What is the effect then of the mere filing of an indemnity selection? Its only effect, we submit, is to give the selector a preference right to the land as against one tendering a filing thereafter."

Rightly speaking, the selection is not to be likened to the initial step of one who wishes to obtain the title to public land by future compliance with the law, but rather to the concluding step of one

who by full compliance has earned the right to receive the title. Referring to a similar grant and the relative obligations of the Government and the grantee, it was said in *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669, 679-680: "The act did not follow the building of the road but preceded it. Instead of giving a gratuitous reward for something already done, the act made a proposal to the company to the effect that if the latter would locate, construct and put into operation a designated line of railroad, patents would be issued to the company confirming in it the right and title to the public lands falling within the descriptive terms of the grant. The purpose was to bring about the construction of the road, with the resulting advantages to the Government and the public, and to that end provision was made for compensating the company, if it should do the work, by patenting to it the lands indicated. The company was at liberty to accept or reject the proposal. It accepted in the mode contemplated by the act, and thereby the parties were brought into such contractual relations that the terms of the proposal became obligatory on both. *Menotti* v. *Dillon*, 167 U. S. 703, 721. And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the Government. In other words, it earned the right to the lands described." And speaking specially of the right to indemnity lands under such a grant, it was said in *United States* v. *Southern Pacific R. R. Co.*, 223 U. S. 565, 570: "What a railroad is to be indemnified for may be fixed as of the moment of the grant, but what it may elect when its right to indemnity is determined depends on the state of the lands selected at the moment of choice. Of course the railroad is limited in choosing by the terms of the indemnity grant, but the so-called grant is rather to be described as a power. Ordinarily no color of title is gained until the power is exercised. When it is exercised in satisfaction of a meritorious claim which the Government created upon valuable consideration and which it must be taken to have intended to satisfy (so far as it may be satisfied within the territorial limits laid down), it seems to us that lands within those limits should not be excluded simply because in a different event they would have been subject to a paramount claim."

The ultimate obligation of the Government in respect of the indemnity lands is on the same plane as that respecting the lands in place. The only difference is in the mode of identification. Those in place are identified by filing the map of definite location, and the indemnity lands by selections made in lieu of losses in the place limits. *St. Paul & Sioux City R. R. Co.* v. *Winona & St. Peter R. R. Co.*, 112 U. S. 720, 731-733; *Southern Pacific R. R. Co.* v. *Bell*, 183 U. S. 675, 687. The selections are to be made by the grantee, not by the Secretary of the Interior. True, the act provides that they shall be made under the Secretary's direction, but this merely applies to them the general rule, announced in Rev. Stat. §§ 441, 453, 2478, that the administrative execution of all public land laws is to be under his "supervision" and "direction". *Catholic Bishop of Nesqually* v. *Gibbon*, 158 U. S. 155, 166. Its purpose is to make sure that, in accord with that power of supervision and direction, he is to see to it that the right of selection is not abused, that claims arising out of prior settlement and the like are not disturbed, that no indemnity is given except for actual losses of the class intended, and that the lands selected are such as are subject to selection. But of course it does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress as manifested in the granting act. *Cornelius* v. *Kessel*, 128 U. S. 456, 461; *Orchard* v. *Alexander*, 157 U. S. 372, 383; *Williams* v. *United States*, 138 U. S. 514, 524; *Daniels* v. *Wagner*, 237 U. S. 547, 557-561; *Northern Pacific Ry. Co.* v. *McComas*, 250 U. S. 387, 392-393. The cases cited as making for a different conclusion respecting the Secretary's discretion were examined and that view of them rejected in *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 387-388, and *Daniels* v. *Wagner*, 237 U. S. 547, 557-561. In the *Weyerhaeuser* case it was held that the authority conferred on the Secretary respecting the selection of indemnity lands "involved not only the power but implied the duty to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections".

As before shown, this indemnity selection was made in full compliance with the directions promulgated by the Secretary, was of lands subject to selection, and was based on actual losses in the

place limits adequate to sustain it. The railroad then had been constructed and equipped as required by the granting act and nothing remained to be done by the grantee or its successor to fulfil the conditions of the grant and perfect the right to a patent. The rule applicable in such a situation is that "a person who complies with all the requisites necessary to entitle him to a patent for a particular lot or tract is to be regarded as the equitable owner thereof". *Wirth* v. *Branson*, 98 U. S. 118, 121; *Benson Mining Co.* v. *Alta Mining Co.*, 145 U. S. 428, 432. This rule has been applied and enforced where the Secretary through an error of law declined to approve and give effect to lawful selections and certified the lands for the use of another claimant,—the court saying that the Secretary could not thus deprive the selecting company of "rights which became vested by its selection of those lands." *St. Paul & Sioux City R. R. Co.* v. *Winona & St. Peter R. R. Co.*, 112 U. S. 720.

The act under which the subsequent power-site withdrawal was made is confined to "public lands," a term uniformly regarded as not including lands to which rights have attached and become vested through full compliance with an applicable land law. *Newhall* v. *Sanger*, 92 U. S. 761, 763; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 391; *United States* v. *Hemmer*, 241 U. S. 379, 385-386. Besides, to apply the act to the lands in question, lawfully earned and selected as they were, would work such an interference with private rights as plainly to require that it be construed as not including them. *Wilcox* v. *Jackson*, 13 Pet. 498, 513; *Lytle* v. *Arkansas*, 9 How. 314, 333, 335; *Sinking Fund Cases*, 99 U. S. 700, 718-719; *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 400.

We are asked to say that this is a suit against the United States and therefore not maintainable without its consent, but we think the suit is one to restrain the appellants from canceling a valid indemnity selection through a mistaken conception of their authority and thereby casting a cloud on the plaintiff's title. *Ballinger* v. *Frost*, 216 U. S. 240; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619-620; *Lane* v. *Watts*, 234 U. S. 525, 540.

Our conclusion is that in giving effect to the withdrawal as against the prior selection, which admittedly was valid when made, the appellants departed from a plain official duty, and that to

avoid the resulting injury to the plaintiff, for which no other remedy is available, an injunction should issue directing a disposal of the selection on its merits unaffected by the withdrawal. Such an injunction, we think, is better suited to the occasion than that indicated by the Court of Appeals. In other respects the decree of that court is

Affirmed.

A true copy.

Test:

Clerk Supreme Court, U. S.